

Supreme Court, U.S.
FILED

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No. 081069 FEB 17 2009
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IN THE
SUPREME COURT OF THE UNITED STATES

EARNESTINE O. BROWN,

Petitioner,

v.

CITY OF CHESTER REDEVELOPMENT
AUTHORITY,

Respondent,

On Petition For A Writ Of Certiorari
To The Supreme Court of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

- I. Whether the Petitioners Fifth Amendment Due Process Rights and protections from the Taking Clause were violated when the Court barred evidence of favored private entities, incidental or pretextual economic benefit to the public, and vague promises of economic benefits in a hearing on Preliminary Objections challenging the rights of the State to take private property when these circumstances exist.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Earnestine O. Brown, Pro Se, respectfully petitions for a writ of certiorari to review the deemed decision and judgment of the Supreme Court of Pennsylvania on Petition for Allowance of Appeal.

OPINIONS BELOW

The order of the Supreme Court of Pennsylvania (App. 1) denying allowance of appeal and thereby affirmed the opinion of the Commonwealth Court of Pennsylvania (App.2) and the order of the Court of Common Pleas Of Delaware County (App.), and opinion of the Court of Common Pleas of Delaware County Pennsylvania (App.) are not reported.

JURISDICTION

The judgment of the Supreme Court of Pennsylvania (App. 1) was entered on November 17, 2008. The jurisdiction of this Court rests on 28 U.S.C. sec 1254 (1).

STATUTORY PROVISIONS INVOLVED

Eminent Domain Code, 26 Pa.C.S. § 204(a)
United States Constitution Amendment V.

STATEMENT

The real property, which is the subject of the condemnation proceedings appealed from in this case, is a single detached commercial and residential building with approximately 9,000 square feet of floor space located on a 24,000 square foot parcel of prime commercial land in the Southeastern Central Business District in the City of Chester, Pennsylvania being known as 405 Madison Street ("the/ Petitioner's property"). Based on the long time continual commercial usages of the property, e. g. Jewish Girls and Boy's Youth Home of Delaware County, Delaware County headquarters for the nationally acclaimed Opportunities Industrialization Center , daycare center and as a church, the property was designated "a social services building" by the zoning and taxing authorities of the City of Chester ("the City").

On March 13, 2003, Petitioner obtained simple fee title to the property from its then owner, former heavyweight boxing champion Joe Frazier, who had maintained the property as a commercial and residential usage. Petitioner continued this usage and made considerable physical improvements to the interior of the building and the landscape.

Sometime in 2000, the City embarked upon a comprehensive plan "to develop a road map to address issues and problems that were attacking the City in a negative fashion". This plan did not call for any eminent domain to accomplish its purpose. In March 2004, the City, by its Planning

Commission embarked upon a study, entitled "Redevelopment Area Plan for South East Central District Area #1, core of the downtown business district of the City, and designated the properties within Area #1 as "blighted". Though Petitioner's property was within Area #1, it was not blighted but improved and occupied. App. 13

On May 12, 2004, the City, by its Redevelopment Authority (hereafter "the Authority") negotiated an agreement of sale and redevelopment agreement with Vahan Gureghian ("Gureghian"), a private for-profit/developer, for him to purchase Petitioner's property for charter school purposes. At that time no notice of declaration had been approved or issued by the Authority and Petitioner had no knowledge or notice of these contractual arrangements between the Authority and Gureghian. The Authority's Executive Director testified that the Authority had entered into the agreements with Gureghian because "[t]he charter school didn't approach us to enter into an agreement. Mr. Gureghian did." App. 14. Gureghian, himself, testified that his role in the whole scheme of things was that he was "nothing more than a landlord to the charter school" and under one agreement with the Authority rented up to thirty properties through the Authority and also some other properties not under the control of the Authority. App.14. As astute a landlord as his agreement with the Authority provided for, Gureghian professed that he did not know the gross amount he received from renting the vast number of properties he gained ownership of or control over through the Authority. App.14. Moreover, under Pennsylvania

law a charter school is required to be a non-profit corporation and Gureghian was clearly a for-profit enterprise.

On June 30, 2004, to consummate the tentative May 2004 agreements with Gureghian, the Authority adopted the study as its redevelopment plan. On August 11, 2004, the City of Chester Planning Commission amended the redevelopment plan to include educational buildings and accessory use, as a public use provided that Gureghian secured the necessary zoning approvals. In furtherance of the May 2004 agreements with Gureghian, the Authority drafted a formal Agreement of Sale and a Redevelopment Agreement ("the Agreement") under which Gureghian assumed responsibility for all costs associated with the acquisition of the petitioners property provided approval of the redevelopment plan was granted by City Council. On February 9, 2005, City Council approved both the Agreement and the redevelopment plan and on July 6, 2005 formally executed the Agreement with Gureghian. On July 14, 2005, the Authority filed its declaration of taking.

Interestingly, in April 2005 Gureghian approached Petitioner, with a written proposal to purchase the property from her at a non-negotiable price of \$100,000.00. Gureghian's proposal was rejected outright by Petitioner, as the Authority had commissioned a preliminary appraisal of the property, which appraisal rated the property as being Historic Class "C" with a replacement value of \$795,000.00.

On August 15, 2005, Petitioner duly filed preliminary objections to the declaration of taking and at the evidentiary hearing held on December 12, 2006 contended and produced evidence showing that (1) the declaration of taking was not intended to primarily confer benefits for a public purpose but rather for a private purpose "with only incidental or pretextual public benefits", if any at all, being derived therefrom in contravention of the Taking Clause of the Fifth Amendment (2) the taking was done in contravention of the standards set out in the recently decided *Kelo v. City of New London*, 545 U.S.____ 2005 decision, (3) under its Agreement with Gureghian, the Authority unlawfully delegated its eminent domain functions to a private party and same demonstrated a predeclaration "impermissible favoritism" to a private party in violation of the Public Use Clause of the Fifth Amendment and (4) issues surrounding unfair dealings and negotiations by the Authority and Gureghian in concert and against Petitioner in regard to the taking and just compensation therefor. In conjunction with the preliminary objections, Petitioner received documents released by the Authority in July 2006, pursuant to court ordered discovery, Petitioner first became aware of the Agreement between Gureghian and the Authority, which Agreement provided for the Authority to immediately transfer title to Petitioner's property to Gureghian after the authority gained it through eminent domain.

From the onset of the December 12, 2006 hearing on preliminary objections, the trial court

declared that the only evidence it considered relevant and would be considering would be limited to whether the taking was or was not for a public purpose. App. 53 Consequently, Petitioner's attempt to introduce evidence relating to and providing proof of complicity between the Authority and Gureghian to effectuate a taking by the Authority for the express purpose of primarily benefitting Gureghian under the pretext of such being for a public benefit, to wit, a charter school, were steadfastly rejected as irrelevant. The trial court further ruled that the *Kelo* standards and decision were neither relevant nor would be considered in its disposition of the preliminary objections. On December 13, 2006, the trial court issued an order dismissing the preliminary objections. App.34. On January 11, 2007, Petitioner duly appealed the trial court's decision to the Commonwealth Court of Pennsylvania.

Pursuant to the appellate rules, Petitioner duly filed her matters complained of on appeal therein alleging that (1) in essence, the taking violated her constitutional rights under the Fifth and Fourteenth Amendments to the U.S. Constitution; (2) the trial court abused its discretion by disallowing her to introduce testimonial and documentary evidence to establish prohibited conduct, per the *Kelo* decision, by the Authority in violation of the Fifth Amendment; and (3) the trial erred in denying her full and fair opportunity to be heard and to present evidence on her behalf in violation of her due process rights under the Fifth Amendment. In response to Petitioner's submission, on March

8, 2007 issued its written opinion confirming its denial of the preliminary objections on the basis that the witnesses' testimony and other proffered evidence related to favoritism, contract negotiations, the terms of the Agreement, the lack of benefits to the public and other interactions between the Authority and Gureghian were irrelevant and Petitioner had waived all other issues. Petitioner duly appealed the decision to the Commonwealth Court of Pennsylvania. App.2.

Before the Commonwealth Court on appeal, Petitioner argued that the trial court's refusal to consider the *Kelo* decision and to preclude her proffered evidence constituted an abuse of discretion, error of law and violated her Fifth Amendment rights under the Fifth Amendment. Petitioner argued that the proffered precluded evidence would have served to prove that the taking arose from a secretly devised limited private development plan outside the purview of the City's comprehensive economic development plan and was intended to primarily, if not wholly, confer benefits on the sole identified pre-development plan private beneficiary, Gureghian, who was particularly favored by the City and that only incidental or pretextual public benefits, if any, would inure to the public as a result.

In a manner reminiscent of the *Kelo* decision, the Commonwealth Court's April 22, 2008 decision was bipolar. The majority of the Commonwealth Court found that Petitioner had technically waived all of her arguments before the

Court and thereby affirmed the trial court's decision.

The dissent, on the other hand, found that notwithstanding that some of Petitioner's arguments on appeal "might [have been] "inartfully framed", nevertheless Petitioner, by way of her preliminary objections, clearly "preserved her underlying contention that she attempted to advance in her preliminary objections, in her presentation of evidence and cross-examination at trial and in her appellate arguments that the taking of her property was not conducted for a public purpose but rather for a private purpose" and that "[the] record support[ed] [Petitioner's] contention." App 53. Judge Smith-Ribner, writing for the dissent, noted that under Pennsylvania law "that a taking [would] have a public purpose only when the public is to be the primary and paramount beneficiary of the exercise of eminent domain power" citing *In re Forrester*, 575 Pa. 365, 836 A.2d 102 (2003), and that the standard established by the Supreme Court for finding a taking for a public purpose was "to look for the 'real or fundamental purpose' behind the taking" and assure that its "true purpose" was to primarily benefit the public, citing *Middletown Township v. Lands of Stone*, 939 A.2d 331, 337 (Pa. 2007). App. 17-18. The dissent, after thoroughly addressing and deciding each of the four delineated issues raised by Petitioner in her favor, concluded:

"The entire history of the transaction here shows favoritism and taking of one person's

private property for pretextual public benefit. The initial approach was by Gureghian, not by the School. After initial agreements with Gureghian, the Planning Commission and the Authority modified the original plan and proposal to include charter school uses. Gureghian as landlord will be paid rent so long as the use continues, and, as [Petitioner] notes, Gureghian conceded that acquisition of [Petitioner's] property was not crucial to the School's continued existence. This record unequivocally supports the conclusion that the 'true purpose' for the taking was primarily to benefit Gureghian and that [Petitioner's] challenge to the taking on that basis should be sustained." (Judge Smith-Riber, with Judge Cohn Jubdelirer joining, for reversal of the trial court. App. 13,14.

Petitioner duly filed a Petition for Allowance of Appeal with the Supreme Court of Pennsylvania, whom by its November 17, 2008 order denied the Petition and, therefore, the Commonwealth Court's April 22, 2008 majority decision was deemed the judgment of the Supreme Court.

REASONS FOR GRANTING THE PETITION

By this case, this Court is expressly confronted with the fully manifested "horribles" the majority in *Kelo* rejected as a basis for "a bright-line rule" or "heightened form of review" of a taking under a comprehensive economic development consistent with the restraints of the Fifth Amendment. 545 U.S.456.

The majority in *Kelo* expressly noted that it was not "forclos[ing] the possibility a more stringent standard of review than that announced in *Berman* [v. *Parker*, 348 U.S. 26 (1954)] and [*Hawaii Housing Authority v. Midkiff*, [467 U.S. 229 (1984)] might be appropriate for a more narrowly drawn category of takings" and rightly so, since this case meets this observation by the majority in *Kelo*. This case presents even the potential "horribles" envisioned by the majority, to wit, "[takings] in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause". [Mr. Justice Kennedy concurring and citing his concurring opinion in *Eastern Enterprises v. Apfel*, 524 U.S. 498, 549-550 (1998)].

Moreover, the instant case presents a factually sound and legally supported scenario which even the majority in *Kelo* recognized would potentially surface, with "the parade of horribles", absent in *Kelo*, but well intact and ripe for its review of the economic development taking process involved and for a determination whether

a bright-line rule or heightened standard of scrutiny is necessary to safeguard the fundamental individual right against an unconstitutional intrusion and/or deprivation by the sovereign under its eminent domain powers. This case provides that opportunity.

ARGUMENT

I. The City of Chester condemnation of Petitioner's private property, that stemmed from a limited pre-textual economic development plan and that not only identified the private beneficiary thereof pre-taking but to whom the taking was purposely designed to primarily benefit with only an incidental and pre-textual benefit to the public, failed to meet the constitutional requirements of a taking for public use under both Pennsylvania law, with a more stringent standard of review, and the U.S. Supreme Court standards, as espoused in *Kelo*, thereby rendering same a violation of Petitioner's Fifth Amendment rights and the Pennsylvania courts' failure to vindicate this deprivation of Petitioner's fundamental right necessitates the intervention of U.S. Supreme Court to do so.

A. The taking failed to meet the for public purpose requirements under Pennsylvania law and the Pennsylvania courts erred in failing to vindicate this fundamental right.

Section 204(a) of the Pennsylvania Eminent Domain Code, 26 Pa.C.S. states: "Prohibition. Except as set forth in subsection (b),

the exercise by any condemnor of the power of eminent domain to take private property in order to use it for private enterprise is prohibited." Consistent therewith, the Supreme Court of Pennsylvania has steadfastly held to the standard that a taking will be seen as having a public purpose *only* where the public is to be the primary and paramount beneficiary of its exercise. Cf. *Middletown Township v. Lands of Stone*, 939 A.2d 331, 337 (Pa. 2007), wherein the Supreme Court stated:

"In the State of Pennsylvania, the courts will view the taking of property under the declaration of taking as having a public purpose only where the public is to be the primary and paramount beneficiary of its exercise." [Citation Omitted]. In considering whether a primary public purpose was properly invoked, this Court has looked for the 'real or fundamental purpose' behind a taking. [Citation Omitted].

Stated otherwise, that the true purpose must primarily benefit to the public." 939 A.2d at 337. [Emphasis Added].

In the instant case, it is unequivocally clear that the City's primary purpose for exercising its powers of eminent domain to take Petitioner's private property was to primarily benefit another private enterprise that City had identified pre-taking and to whom City intended would receive the lion's share of the benefits to be derived from the taking while pretextually professing its act to be for public use when the public would only realize, if at all, only a nominal benefit therefrom.

By the written agreement with the private beneficiary, Gureghian, prior to issuing the declaration of taking, the City's pretext of a taking for public use can readily be discerned. The purpose for condemning Petitioner's property, under the amended limited economic development plan which classified the business district (Area #1) as "blighted", was for educational institutions with a charter school being mentioned as an accessory use. Pursuant to the agreement with Gureghian, the declaration of taking was issued for the express purpose of transferring the property to Gureghian, whose sole role was to be the landlord of the property and collect rents therefor perpetually.

The trial court limited the evidentiary process to the sole issue of whether the taking was for a "purely private purpose" and determined that since charter schools are public under Pennsylvania law that the taking was for a public use. Petitioner, viewing the taking of her property as falling squarely within the "horribles", "dangers" and "harms" both the majority and dissent espoused in *Kelo* and projected would meet the criteria for a "bright-line rule" or "heightened standard of review" of takings under comprehensive economic development plan wherein a private entity receives the property and the benefits thereof purportedly for public use, tried in vain to present evidence to establish that (1) the economic development plan was not a comprehensive one, (2) the declaration of taking was for a private and not a public use, (2) the City exceeded its eminent domain powers by unlawfully delegating that

power to a private individual, who was also the primary beneficiary of the taking, (3) the taking was pretextual and (4) the public benefits therefrom were pretextual and incidental and thereby fulfill the requirements under *Kelo*, but was thwarted at every turn by the trial court. The testimonial evidence adduced, however, established that it was Gureghian, the private enterpriser, who approached the City and the Authority about employing eminent domain proceedings, when yet there was no mention of any public use of the properties to be taken the City undertook to do so to enthrone Gureghian, the primary beneficiary under the taking, as the owner of the properties and landlord to any and all potentially users of the properties perpetually.

Unfortunately but predictably under the circumstances, the trial court overruled Petitioner's pro se preliminary objections to the taking on the basis that Petitioner had failed to establish, by clear and convincing evidence, that the taking was for a "purely private purpose". The trial court's proceeding and decision so contravened Pennsylvania's statutory, evidentiary and procedural laws as to constitute an egregious abuse of discretion and deprivation of Petitioner's fundamental due process and Fifth Amendment rights.

Though Petitioner pro se duly preserved the forestated issues and deprivation of her due process and Fifth Amendment rights, and duly appealed the matter to the intermediate appellate court, she faired no better, as the majority opinion of that Court, rather than addressing the

propriety of the trial court's evidentiary rulings limiting the evidence and proceedings to the erroneous singular issue of whether the taking was for a "purely private purpose", chose to treat Petitioner's pro se, "inartfully framed" appeal and arguments as having constituted a waiver of each and every argument. App.53

The dissent, in its sound application of both Pennsylvania law and looking to the *Kelo* decision, ruled that (1) the trial court had erroneously placed the burden on Petitioner and that the taking was not for a public purpose under Pennsylvania law, (2) the taking was pretextually for a public purpose when in fact it was done, as admitted by the condemnor, at the behest of and for the benefit of the private beneficiary, (3) the taking would only pretextually benefit the public and was purposed to primarily and perpetually benefit the private beneficiary and (4) the City had unlawfully delegated its eminent domain powers in this case to the private beneficiary to effectuate the taking and to direct the benefits thereof to himself. Thus, the dissent called for a reversal of the trial court's decision.

Again, Petitioner filed her pro se Petition for Allowance of Appeal with the Supreme Court, who summarily denied the petition and thereby the Commonwealth majority decision became its decision and the egregious errors of law, abuses of discretion and violations of Petitioner's due process and Fifth Amendment rights were allowed to stand without any recourse for vindication. Thus, the only avenue remaining for Petitioner to find justice rests with this Court to

review and decide this case upon well established Pennsylvania and federal constitutional principles and laws which the Pennsylvania appellate courts apparently chose not to employ and to allow a private economic interest to overshadow the constitutional mandate and to ignore the constitution deprivations and harm perpetuated thereby. Every good reason exists, therefore, for this Court to allow the Writ to issue and to decide this matter not only for the sake of Petitioner, who has been grievously harmed by the decisions below, but also for the mass of private U.S. citizens who have, are and/or will be the subject of such constitutionally deficient and unlawful proceedings under the guise of a sovereign exercising its eminent domain powers purportedly for the great good of the public.

B. The Pennsylvania state court decisions, upholding the taking for a public use, is neither supported by the record nor meets the minimum standards for a taking under a comprehensive economic development plan under *Kelo*, and the deprivations of Petitioner's due process and Fifth Amendment rights as a result thereof necessitates a review and reversal of that decision by this Court.

The majority in *Kelo* upheld the taking in that case, on the basis that the public use was not pretextual nor were the benefits to be derived by the public pretextual or incidental and, therefore there existed no mandate for it to adopt a "bright-

line rule" or "heightened standard of review" of takings under a comprehensive economic development plan wherein a private entity is the beneficiary of the property taken and from/through which the public benefit is to be derived. The majority further opined that the "parade of horribles" espoused by the petitioners, *amicus curie* and the dissent, did not exit in that case but expressed its willingness to impose such standards upon being presented with a case harboring those factors. And this case squarely presents itself as that potential case with those "horribles" well intact and necessitating a scrutiny of that taking by this Court.

For the sake of brevity and not to reiterate what has already been adequately stated and argued hereinbefore concerning the application of the standards espoused by both Mr. Justice Kennedy (concurring) the dissent for reviewing such takings, suffice it to briefly mention the core principles expressed in *Kelo* that are also applicable to this case.

In his concurring opinion in *Kelo*, Mr. Justice Kennedy pointedly stated: "[T]ransfers intended to confer benefits on particular, favored private entities, and with only incidental or pretextual public benefits, are forbidden by the Public Use Clause of the Fifth Amendment]." 545 U.S. at 490. He then set f that the standard he believed should be employed such a case, to wit:

"A court confronted with a plausible accusation impermissible favoritism to private parties should treat the objection as a

serious one and review the record to see if it has merit, though with the presumption that the government's actions were reasonable and intended to serve a public purpose." *Id.* At 491.

The "parade of horribles" Mr. Justice Stevens, writing for the majority, said were not present before the Court in *Kelo* but recognized might potentially arise, *545 U.S. at 456.*, and the dangers and harm Mister Justice Kennedy (concurring), Madame Justice O'Connor with the Chief Justice and Mr. Justices Scalia and Thomas (dissenting) declared would arise, have come home to roost, that is, to dismantle the very walls of protection the Taking and Public Use Clauses of the Fifth Amendment that were promulgated to protect the private citizenry from being dispossessed of their private property by the sovereign at the behest of and for the primary, if not total, benefit of private entities acting in concert with the sovereign. These safeguards were enthroned in the Constitution to insulate private citizen A from the tyrannical exercise of power by the sovereign against citizen A for the economic benefit of private citizen B, who by complicity with the sovereign in pre-taking planning is identified as the primary, if not complete, beneficiary of the economic benefits to be realized from the subsequent taking of A's property, under a limited economic development plan, and transferring same to B to effectuate that private economic plan. The fact that some incidental benefits might inure to the public, strictly as a result of some "crumbs that [might] fall from their [ill-conceived, private economic plan]", *Matthew 15:27*, does not and should not

be allowed in this and like economic redevelopment taking cases throughout the United States to serve as the impetus for this Court "to wash out any distinction between private and public use of property and thereby effectively delete the words 'for public use' from the Taking Clause of the Fifth Amendment. *Kelo*, 545 U.S. 463, (Madame Justice O'Connor dissenting).

In petitioners case, there was no "orderly implementation of a city or county comprehensive redevelopment plan" for the taking (Mr. Justice Stevens), recites that the "taking [did not occur] in the context of a comprehensive economic development plan meant to address a serious city-wide depression" (Mr. Justice Kennedy), and "the identity of [the] private beneficiar[y] [was] known at the time the city formulated its [limited redevelopment plan that had been simply converted from a "study" of one of the multiple districts of the city to a development plan and executed through the political process to effectuate the private agreement between the city and the private beneficiary". And finally, the taking in this case is of such a suspicious nature, the procedures employed to effectuate the taking so abusive and the purported benefits to the public are so trivial or implausible that a presumption of an "impermissible private purpose" should be appended to this and like cases, as soundly argued for by Mr. Justice Kennedy, concurring in *Kelo*. As more succinctly expressed by Madame Justice O'Connor and Mr. Justice Thomas in *Kelo*, to wit, that a taking, as occurred in this case, is simply the result of a

private beneficiary with "disproportionate influence and power in the political process" lording over and victimizing the weaker, economically disadvantaged private landowner under the guise of a legitimate taking when in reality the proceeding was a sham to effectuate purely private economic interests without fear that the courts will intervene to either prevent or rectify such a "deeply perverse" interpretation of the framer's intent and purpose for the Public Use and Taking Clauses of the *Fifth Amendment*.

Regardless of whether this case is reviewed under the standard employed by the majority or those standards Mr. Justice Kennedy and the dissenters in *Kelo* argued should have been put into place in that case, the condemnation purpose, process and results in this case not only offends reasonable notion of a taking of private property for a public use but so startling manifests the constitutional deficiencies in the existing standards to the extent that absent such every citizen might well now know that the United States has reverted to a monarchy and all lands belong to the sovereign king—the condemnor. This ought not to be!

CONCLUSION

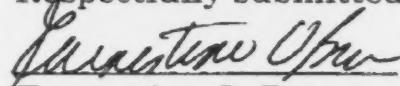
With the Supreme Court of Pennsylvania having failed to fulfill its duty to safeguard Petitioner's rights under the Fifth Amendment, though the standard in Pennsylvania calls for a more stringent scrutiny of a taking than that espoused by the majority in *Kelo*, resort to this Court is made for rectification of a clear violation

of Petitioner's fundamental constitutional rights under the Fifth Amendment. The patently constitutionally deficient taking in this case necessitates this Court's exercise of its constitutionally delegated power and judicial mandate to rectify the wrong that has been committed against this Petitioner specifically and which potentially will impacts every private citizen of the United States whose private property is presently or might become subject to an economic development taking with a private entity being the beneficiary thereof. The enumerated "dangers" and "horribles" by this Honorable Court and the Supreme Court of Pennsylvania can hardly go unheeded or be allowed to fall by the wayside to give unwarranted preferences to purely technical and/or procedural matters or to fail to fashion a just remedy for the real harm that exists by characterizing a more definitive review process for doing so as being speculative. There exists no conjecture in this case concerning the City of Chester's "true purpose" for its taking, to wit, to primarily benefit a pre-plan identified beneficiary, who was favored throughout the process and who would primarily benefit from the pretextual public use and the nominal benefits that potentially might inure to the public would be incidental at best. Putting aside this case, the snowy "horribles" of *Kelo* might well become the deadly nightmares of a fallen fundamental right against the tyrannical power of the sovereign to take from its citizenry what its controlling existence, the U.S. Constitution, has declared cannot be done beyond the confines of its salient purposes and prohibitions. The time is right, the

cause is just and this Court would be hard pressed to look for a case more factually and judicially ripe for a review and determination of what are the appropriate standards to be employed by courts, even within the context of this Court's decision in *Kelo*, in reviewing the economic development process to safeguard the fundamental righ

ts of a private citizen to not being divested of his/her private property for the benefit of another private citizen under the guise of such a pretextual Fifth Amendment "taking" having been done for the greater good of the public. This case not only mandates a reversal for the taking in this case having failed to meet even the existing standards of *Kelo*, *Berman* and *Midkiff*, but is also representative of the totality of the whole of the private citizenry's yet crying out for clearly defined standards under which subordinate courts are to scrutinize the taking of private properties for economic development purposes under the public use clause of the Fifth Amendment.

Respectfully submitted,


Earnestine O. Brown

February 17, 2009

App.1

App.1

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 341 MAL 2008

IN RE: CONDEMNATION OF LAND FOR
THE SOUTH EAST CENTRAL
BUSINESS DISTRICT REDEVELOPMENT
AREA # 1 (405 MADISON STREET, CITY
OF CHESTER

Petition for Allowance of Appeal from
the Order of the Commonwealth Court

PETITION OF: EARNESTINE O.
BROWN

ORDER

PER CURIAM

AND NOW, this 17th day of November,
2008, the Petition for Allowance of Appeal is
hereby DENIED.

TRUE & CORRECT COPY

ATTEST: November 17, 2008

Elizabeth Zisk, Chief Clerk

IN THE COMMONWEALTH COURT OF
PENNSYLVANIA

In Re: Condemnation of land for the
South East Central Business District
Redevelopment Area #1: (405 Madison
Street, City of Chester)

No. 651 C.D. 2007

Submitted: March 12, 2008

Appeal of: Earnestine O. Brown

BEFORE: HONORABLE BONNIE BRIGANCE
LEADBETTER, President Judge
HONORABLE DORIS A. SMITH-RIBNER, Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROCHELLE FRIEDMAN, Judge
HONORABLE RENEE COHN JUBELIRER,
Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE MARY HANNAH LEAVITT, Judge

OPINION BY JUDGE FRIEDMAN: FILED: April 22,
2008

Earnestine O. Brown (Brown) appeals from
the December 12, 2006, order of the Court of
Common Pleas of Delaware County (trial court),

App.3

which overruled Brown's preliminary objections to the Declaration of Taking (Declaration) filed by the Redevelopment Authority (Authority) of the City of Chester (City) under the former Eminent Domain Code (Code). ¹We affirm.

¹Act of June 22, 1964, Special Sess., P.L. 84, as amended, formerly 26 P.S. §§ 101.1-903, repealed by section

(2) of the Act of May 4, 2006, P.L. 112. Although repealed, the Code governs this case because, with certain exceptions not applicable here, the new statute applies only to condemnations occurring on or after its September 1, 2006, effective date. *See In Re: Condemnation by County of Berks*, 914 A.2d 962 (Pa. Cmwlth. 2007).

Brown owns the property located at 405 Madison Street in the City (the Property). The property is within the South East Central Business Redevelopment Area #1 (Redevelopment Area), which the City Planning Commission certified as blighted on April 14, 2004.

On May 12, 2004, the Authority approved an Agreement of Sale and Redevelopment Agreement (Agreement) with Vahan gureghian for the purchase and redevelopment of the Property for charter school purposes, contingent upon approval by City Council.² On August 11, 2004, the Authority approved a Redevelopment Plan Proposal (Plan) providing for educational uses and related facilities in the Redevelopment area. On February 9, 2005, City Council approved the Agreement and the Plan. On July 6, 2005, the Authority and Gureghian executed the Agreement, and, on July 14, 2005, the Authority filed its Declaration. (Trial ct. op. at 1, 3; R.R. at 18a-19a, 57a, 66a.)

Brown file preliminary objections to the Declaration with the trial court, asserting that: (1) the taking was "in favor of a private developer." Contrary to Alabama law, although Alabama law conflicts with federal law;³ (2) the current state of eminent domain law is so unsettled that Brown's rights and responsibilities are "uncertain and unprotected by law";⁴ and (3) the acquisition of the Property for

²(Authority's Resolution of 8/11/04, ¶4(b), R.R. at 19a; Agreement, R.R. at 57a-66a.)

³Brown suggests that Alabama law does not permit condemned property to be conveyed to a private developer. Even assuming this to be true, Alabama law has no relevance here.

⁴To the extent Brown argues that her property rights are unprotected by law, Brown appears to conceded that the taking in this case was proper.

Educational buildings will not be beneficial to the public because existing educational building "have been constructed with such inferior materials and workmanship that the ... life span of [the] institution ... will [not exceed] five (5) years."⁵ (R.R. at 24a.) After a hearing on the

matter, the trial court overruled the preliminary objections. Brown now appeals to this court.⁶

I. Evidentiary Rulings on Contracts

Brown first argues that the trial court abused its discretion by refusing to allow Brown to examine witnesses and to present relevant evidence regarding the Agreement and regarding a contract between Brown and Gureghian. The Authority contends that Brown has waived this issue because, in her brief, Brown does not identify any specific evidentiary rulings of the trial court or provide any citation to the record. We agree with the Authority.

Each part of the argument in a brief must contain the particular point being treated, followed by such discussion and citation of authorities as are deemed.

(continued...)

⁶Brown also raised issues relating to the amount of just compensation and liability for property taxes. (R.R. at 24a-25a.) However, such issues are not properly raised in preliminary objections. *See* section 406(a) of the Code, 26

P.S. §1-406(a) (stating that preliminary objections are limited to challenges relating to: (1) the power or right to condemn the property; (2) the sufficiency of the security; (3) the procedures followed by the condemnor; and (4) the declaration of taking).

⁶Our scope of review is limited to determining whether the trial court abused its discretion or committed an error of law. *In re Redevelopment Authority of the City of Philadelphia* (1839 N. Eight Sgt.), ___ Pa. ___, 938 A.2d 341 (2007).

Pertinent. Pa. R.A.P. 2119(a). Arguments not properly developed in a brief will be deemed waived. *Rapid Pallet v. Unemployment Compensation Board of Review*, 707 A.2d 636 (Pa. Cmwlth. 1998). Moreover, the statement of the case and/or

“record” where the ruling, or exception thereto, appears in order to show that the question before the court was timely and properly raised below so as to preserve the question on appeal. Pa. R.A.P. 2117(c); Pa. R.A.P. 2119(e).

Here, Brown merely lists her witnesses and states that the trial court ruled irrelevant their testimony about the Agreement and a contract between Brown and Gureghian. Brown does not discuss the details or circumstances of her

contract with Gureghian; she does **not** indicate what each witness's testimony would have been regarding the Agreement and the other contract; and she does **not** present an argument as to why testimony about the Agreement and the other contract would have been relevant to the issues she raised in the preliminary objections. Moreover, to show the place of each trial court ruling, or exception thereto, Brown simply cites to "pages 6-124 of the hearing transcript. (Brown's brief at 12.) such a citation does **not** constitute a "specific reference" to the places in the record where the rulings or exceptions appear.⁷

⁷We note that Brown does quote the trial court's statement at page 44 of the notes of testimony: "I haven't heard a single relevant fact from this ... witness, yet, in an hour," (R.R. at 167a.) However, Brown does not explain why the trial court's statement was incorrect.

Absent proffered testimony to review or properly developed arguments to consider, we are unable to perform appellate review of the trial court's rulings. Thus, Brown's first argument is deemed waived.

II. Evidentiary Rulings on Delegation

Brown next argues that the trial court abused its discretion in refusing to allow Brown to present relevant evidence to prove that the Authority improperly delegated its eminent domain powers to Gureghian through the Agreement. However, in her brief, Brown does not indicate what relevant evidence she would have presented as proof of improper delegation, and she does not identify any specific ruling by the trial court in this regard. Absent some knowledge of the excluded evidence and an argument to consider, we are unable to perform appellate review of the trial court's rulings. Thus, Brown's second argument is deemed waived.⁸

⁸Instead of arguing how the trial court abused its discretion by excluding evidence showing improper delegation, Brown argues that the authority improperly delegated its eminent domain powers through its Agreement with Gureghian. The latter would have been a proper issue for brown to raise in her preliminary objections. *See* 26 P.S.§1-406(a) (allowing preliminary objections challenging the procedures followed by the condemnor). However, Brown did not raise such an issue, and the failure to raise an issue permitted objections constitutes a waiver of that issue. *Id.*

We also note that, in making her argument, Brown challenges the determination of blight. However, this issue is not set forth in, or suggested by, the statement of questions involved; thus the matter is waived. *See Pa. R.A.P. 2116(a)* (stating that, ordinarily, no point will be considered which is not set forth in the statement of questions involved or suggested thereby).

III. Evidentiary Rulings on Private Benefit

Finally, Brown argues that the trial court abused its discretion in refusing to allow Brown to present relevant evidence showing that the Authority took the Property for the private benefit of Gureghian. However, in her brief, Brown does not indicate what relevant evidence she would have presented, and she does not identify any specific ruling by the trial court in this regard. Absent some knowledge of the excluded evidence and an argument to consider, we are unable to perform appellate review of the trial court's ruling. Thus, Brown's final argument is deemed waived.⁹

Accordingly, we affirm.

ROCHELLE S. FRIEDMAN, Judge

⁹We note that Brown did not raise this issue in her preliminary objections. For that reason, too, the issue is waived. 26 P.S. §1-406(a).

IN THE COMMONWEALTH COURT OF
PENNSYLVANIA

In Re: Condemnation of Land for the
South East Central business District
Redevelopment Area #1 (405 Madison
Street, City of Chester) No. 651 C.D. 2007

Appeal of: Earnestine O. Brown

ORDER

AND NOW, this 22nd day of April, 2008, the
order of the Court of Common Pleas of Delaware
County, dated December 13, 2006, is hereby
affirmed.

ROCHELLE S. FRIEDMAN, Judge

IN THE COMMONWEALTH COURT OF
PENNSYLVANIA

In Re: Condemnation of land for the
South East Central Business District
Redevelopment Area #1: (405 Madison
Street, City of Chester)

No. 651 C.D. 2007

Submitted: March 12, 2008

Appeal of: Earnestine O. Brown

BEFORE: HONORABLE BONNIE BRIGANCE
LEADBETTER, President Judge
HONORABLE DORIS A. SMITH-RIBNER, Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROCHELLE . FRIEDMAN, Judge
HONORABLE RENEE COHN JUBELIRER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
DISSENTING OPINION
BY JUDGE SMITH-RIBNER

FILED: April 22, 2008

I respectfully must disagree with the decision of the majority to affirm the order of the Delaware County Court of Common Please, which overruled the preliminary objections filed by Earnestine O. Brown (Brown) to the declaration of taking filed by the Redevelopment Authority (Authority) of the City of Chester (City) in regard to Brown's improved property at 405 Madison Street in the City. As the majority notes, on May 12, 2004 the authority approved an agreement of sale and a redevelopment agreement with Vahan Gureghian (Gureghian) for Gureghian to purchase the property for charter school purposes.

David Sciocchetti, Executive Director of the Authority, admitted in his testimony that the Authority entered into an agreement with Gureghian rather than the Charter School because “[t]he charter school didn’t approach us to enter into an agreement. Mr. Gureghian did.” N.T. 172 – 173; Reproduced Record (R.R.) 295a. Gureghian testified that he is “nothing more than a landlord to the charter school.” N.T. 83; R.R. 206a. He further testified that he rents the parcels for the School, with up to thirty parcels included under one agreement with the Authority and some others not subject to its control. N.T. 90 – 91; R.R. 213a – 214a. He stated that he did not know the gross amount that he receives for renting the parcels. N.T. 91; R.R. 214a.

The City’s Planning Commission completed a study known as the “Redevelopment Area Plan for South East Central Business District Area#1” in March 2004, which determined that the area to which it applied was blighted; Brown’s property is in that area. After coming to the May 2004 agreements with Gureghian, the authority adopted a “Redevelopment Plan Proposal for south East Central Business District Redevelopment Area #1” on June 30, 2004. On August 11, 2004, the Planning Commission amended the redevelopment plan and the Authority amended the redevelopment plan

proposal to include use for educational buildings and accessory uses (specifically mentioning charter schools) as a public use provided that the developer secure necessary zoning approvals.

The Authority drafted an Agreement of Sale and a Redevelopment Agreement (Agreement) under which Gureghian assumed responsibility for all costs associated with acquisition of the properties, contingent upon approval of the redevelopment plan proposal by City Council as required by Section 10 of the Urban Redevelopment Law, Act of May 24, 1945, P.L. 911, as amended, 35 P.S. §1710. City Council approved the redevelopment proposal and the Agreement by resolution of February 9, 2005. On July 6, 2005 the parties executed the Agreement, and the authority filed its declaration of taking on July 14, 2005.

Brown, proceeding in her own behalf, filed preliminary objections. The first, although making a reference to law of the State of Alabama, questioned whether the condemnation and exercise of eminent domain in favor of a private developer created a conflict between state and federal law, citing *Kelo v. City of new London*, 545 U.S. 469 (2005). The second questioned whether the current state of the law was so unsettled that the rights and

responsibilities of the private property owner were uncertain and unprotected by law. The third stated that acquisition of Brown's property for the purpose of transfer to Gureghian for inclusion with educational buildings allegedly had been constructed with inferior materials and workmanship and would not provide benefits for more than five years. Further objections also addressed the topic of just compensation, although that is not a proper subject at the stage of preliminary objections under Section 406 of the former Eminent Domain Code, Act of June 22, 1964, Special Sess., P.L. 84, *as amended, formerly* 26 P.S. § 1 – 406, repealed by Section 5 of the Act of May 4, 2006, P.L. 112.

The trial court conducted a hearing on Brown's preliminary objections on December 12, 2006, at which Brown presented the testimony of George Cordes, private counsel for Gureghian and also an asset manager for the County of Delaware; Mayor Wendell Butler; Gureghian; William C. Payne, City Planner; and Randolph Dixon, Authority Chairman. The Authority presented the testimony of Executive Director Sciocchetti. Stating that the issue was whether a charter school is a public use, the trial court sustained numerous objections to Brown's questions and ultimately overruled Brown's preliminary objections. The trial court's opinion

is support of its order stated that a condemnee bears a heavy burden of proving that a blight determination was made with fraud or in bad faith, citing *Mercurio v. Allegheny County Redevelopment Authority*, 839 A.2d 1196 (Pa. Cmwlth 2004). It also stated that Brown made no allegation that the Authority or anyone else acted fraudulently or in bad faith, nor did she challenge the propriety of the blight determination. "Even if she had done so, the trial court concluded that the record was devoid of evidence in support and noted that the entity responsible for the determination, the Planning Commission, was not a party before the court.

Concerning Brown's complaint that she was barred from introducing evidence permitted by *Kelo*, the trial court stated that the *Kelo* decision did not represent a departure from or significant expansion of eminent domain law in Pennsylvania. In *Kelo* the United States Supreme Court stated that promoting economic development is a traditional function of government, not distinguishable from other public purposes. In *Berman v. Parker*, 348 U.S. 26 (1954), relied upon in *Kelo* the Supreme Court held that condemnation of a store that was not blighted was proper as part of a plan determined to be necessary for an entire neighborhood. In Pennsylvania condemnation of property is proper

only if it for a public use. *Faranda Appeal*, 420 Pa. 295, 216 A.2d 769 (1966). The trial court determined that charter schools are public under "Sections 1702-A and 1703-A of the Charter School Law, Act of March 0, 1949, P.L. 30, *as amended*, added by Section 1 of the act of June 19, 1997, P.L. 225, 24 P.S. §§17-1702-A and 17-1703-A.

As for Brown's claim that the condemnation and Gureghian's role as developer in the subsequent sale was not in the public interest, the trial court referred to *Appeal of Heim*, 617 A.2d 74 (Pa. Cmwlth. 1992), where this Court noted that a taking does not lose its public character merely because there may exist some feature of private gain – if the public good is enhanced it is immaterial that a private interest may also be benefited. The agreement for Gureghian to pay condemnation expenses did make it improper *per se*, and the suggestion of inferior materials and workmanship would be overcome by applicable statutory and regulatory building requirements. Because Brown's preliminary objections did not challenge the blight determination, any such challenge was waived.

II

The majority concludes that Brown has waived all the arguments that she advance here. First Brown argues that the trial court erred and abused its discretion in refusing to allow her to examine witnesses and to present relevant evidence at the hearing in violation of her due process rights. After reviewing the record, I disagree that Brown has waived objections on these points when its is clear from her brief that she challenges specific evidentiary rulings by the trial court and that her references to transcript pages 6- 124 do not create a waiver of arguments as the majority contends. Brown sough to question Attorney cordes (a county employee and counsel for Gureghian), the Mayor, Gureghian, the City Planner and the Authority Chairman regarding their roles in the condemnation process against brown, and she sought to question witnesses about the content and intent of the contracts between Gureghian and the Authority.

The trial court ruled that the witnesses' testimony was irrelevant as to the issues raised in Brown's preliminary objections and as to contract negotiations between Gureghian and the Authority and the terns if the contract. Finding that this testimony would be irrelevant constituted an abuse of the trial court's discretion.

¹The Court's review in an eminent domain case is limited to determining whether the trial court abuse its discretion or committed an error of law; in a case under the Urban Redevelopment Law the Court must see that the authority has not acted in bad faith arbitrarily, that it has followed statutory procedures in preparing a plan and that there are not constitutional violations. *In re Condemnation by Urban Redevelopment*, 823 A.2d 1086 (Pa. Cmwlth. 2003), *aff'd*, 590 Pa. 431, 913 A.2d 178 (2006)

Moreover, the trial court erred to the extent that its decision to overrule Brown's preliminary objections was in any manner premised on consideration of her failure to challenge the blight determination. It is well settled that a condemnee does not waive his or her rights to challenge a taking by failing to challenge a prior blight determination. *See Matter of Urban Redevelopment Authority*, 527 PA. 550, 594 A.2d 1375 (1991).

Second, Brown argues that the trial court erred in ruling irrelevant evidence that would prove the Authority's unlawful delegation of eminent domain powers to Gureghian under provisions of the Agreement. Neither the Eminent Domain Code nor the Urban Redevelopment Law authorized the Authority to give a private party control over the Authority's functions; therefore, it exceeded its powers. The

power to take private property through eminent domain is an attribute of the sovereign. *Peters v. City of Reading*, 321 Pa. 220, 184 A. 23 (1936). The Supreme Court observed the following in *Winger v. Aires*, 371 Pa. 242, 247, 89 A. 2d 521, 523 (1952) (quoting *Lance's Appeal*, 55 Pa. 16, 25 (1867)):

The right of the Commonwealth to take private property without the owner's assent on compensation made, or authorize it to be taken, exists in her sovereign right of eminent domain, and can never be lawfully exercised but for a public purpose — supposed and intended to benefit the public, either meditately or immediately. The power arises out of the natural principle which teaches that private convenience must yield to the public wants. This public interest must lie at the basis of the exercise, or it would be

confiscation and usurpation
to exercise it.

The United States Supreme Court has held that states may not by virtue of the contract clause divest themselves by contract of their right to exert governmental authority. *Contributors to Pennsylvania Hospital v. City of Philadelphia*, 245 U.S. 20 (1917). Brown notes that under the Agreement Gureghian agreed to provide security for the condemnation, but Section 403 of the former Eminent Domain code, 26 P.S. § 1-403, requires that security be given by the condemnor.

Third, Brown argues that the trial court erred in disallowing evidence to set aside the declaration of taking in accordance with the elements of *Kelo*. In *Kelo* it was emphasized that property may not be taken under the pretext of a public purpose when the actual purpose is to bestow private benefits and that a taking is less likely to be pretextual when the ultimate owner was known at the time of the filing of the declaration on July 14, 2005 pursuant to the resolution and the Agreement executed on July 6, 2005. The taking lacked the comprehensive economic development purpose that was upheld in *Kelo*. Rather, the purpose was to take Brown's

property to add an addition to a charter school constructed in 1998.

Brown maintains that she was barred from presenting evidence of favoritism to a private party, making reference to Justice Kennedy's concurring statement in *Kelo* the transfers intended to confer benefits on particular favored private entities, with only incidental or pretextual public benefit, are forbidden by the Public Use Clause of the Fifth Amendment. She disputes the authority's reliance on *Berman* where the taking was pursuant to a comprehensive plan prepared by an administrative agency for redevelopment of a large area of the District of Columbia to eliminate slum and substandard housing conditions.

The majority concludes that Brown does not challenge the trial court's improper exclusion of evidence but rather argues directly that the Authority improperly delegated its eminent domain powers, which would have been a proper subject of a preliminary objection under former Section 406, but Brown did not raise it and, therefore, it is waived. Similarly, the majority concludes that Brown argues abuse of discretion in refusal to allow her to present relevant evidence that the Authority took the property for the private benefit of Gureghian, but she does not

indicated what relevant evidence she would have presented or identify specific rulings and this issue was not raised in her preliminary objections.

In my view, although Brown's preliminary objections and some of her arguments on appeal might be inartfully framed, there is no question that Brown has preserved her underlying contention that she attempted to advance in her preliminary objections, in her presentation of evidence and cross-examination at trial and in her appellate arguments that the taking of her property was not conducted for a public purpose but rather for a private purpose. Further, this record supports that contention. The authority to exercise eminent domain power must be strictly construed, and a certification of blight does not itself authorize condemnation of property. *Winger and redevelopment 'authority of Scranton v. Kameroski*, 616 A.2d 1102 (Pa. Cmwlth. 1992).

In *In re Forrester*, 575 Pa. 365, 836 a.2d 102 (2003), the supreme court observed that a taking will have a public purpose only when the public is to be the primary and paramount beneficiary of the exercise of eminent domain power and that to consider a taking as effectuating a public purpose the citizenry at large rather than a private entity or individual

will be the principal recipient of any benefit. Thus the trial court's repeated assertions that Brown must show that the taking was "solely" for a private benefit were incorrect. In *Redevelopment Authority of Erie v. Owners or parties in Interest*, 274 A.2d 244 (Pa. Cmwlth. 1971), the Court repeated cogent observations of the Pennsylvania Supreme Court that there is not a suggestion anywhere in the Constitution that private property may be taken for a private use.

Although the trial court here restricted Brown to question relating to whether a charter school is a public use, the record nevertheless indicates that this taking was for private benefit. As noted above, Gureghian testified that he is "nothing more than a landlord to the charter school." N.T. 83; R.R. 206a. Although the operation of a charter school is a public purpose, the business of being a private landlord renting land for such a school is not. Moreover, the school is required to be a nonprofit corporation, but Gureghian's enterprise is not. The only explanation of why the Authority did not enter into an agreement with the School, if the intention of the Authority was to provide a benefit to the School, is the testimony of Executive Director Sciocchetti that the School did not approach the Authority - Gureghian did.

In Justice Kennedy's concurring opinion in *Kelo*, 545 U.S. at 490, he pointedly stated: "[T]ransfers intended to confer benefits on particular, favored private entities, and with only incidental pretextual public benefits, are forbidden by the Public Use Clause [of the Fifth Amendment]." Further: "A court confronted with a plausible accusation of impermissible favoritism to private parties should treat the objections as a serious one review the record to see if it has merit, though with the presumption that the government's actions were reasonable and intended to serve a public purpose." *Id.* At 491.² The Pennsylvania Supreme Court recently reiterated in regard to "public purpose":

According to our Court, "a taking will be seen as having a public purpose only where the public is to be the primary and paramount beneficiary of it exercise." *In re*

²Although not applicable to the present controversy, Section(a) of the new Eminent Domain Code, 26 Pa. C.S. §204(a), provides: "Prohibition. ... Except as set forth in subsection (b), the exercise by any condemnor of the power

of eminent domain to take property in order to use it for private enterprise is prohibited."

Bruce Ave., 438 Pa. 498, [505,] 266 "A.2d 96, 99 (1970). In considering whether a primary public purpose was properly invoked, this Court has looked for the "real or fundamental purpose" behind a taking. *Belovsky v Redevelopment Authority*, 357 Pa. 329, [340,] 54 A.2d 277, 283 (1947). State otherwise, the true purpose must primarily benefit the public.

Middletown Township v. Lands of Stone, ____ Pa. ____, ____, 939 A.2d 331, 337 (2007).

The entire history of the transaction here shows favoritism and taking of one person's private property for pretextual public benefit. The initial approach was by Gureghian, not by the School. After initial agreements with Gureghian, the Planning Commission and the Authority modified the original plan and proposal

to include charter school uses. Gureghian as landlord will be paid rent so long as the use continues, and, as Brown notes, Gureghian conceded that acquisition of this particular property was not crucial to the School's continued existence. This record unequivocally supports the conclusion that the "true" purpose for the taking was primarily to benefit Gureghian and that Brown's challenge to the taking on that basis should be sustained.³ I therefore would reverse the order of the trial court.

DORIS A. SMITH-RIBNER, Judge

Judge Cohn Jubelirer joins in the dissent.

³The Authority cites *In re Redevelopment Authority of Philadelphia*, ___ Pa. ___, 938 A.2d 341 (2007), in a supplemental brief filed by permission. The Supreme Court there reversed this Court's determination that taking of a particular property in an area designated blighted many years earlier (where most properties now were vacant) and giving it to a religious organization violated the Establishment Clause of the First Amendment. It is noteworthy, however, that the supreme Court analyzed the claim of a constitutional violation on the limited facts presented in that case.

IN THE COURT OF COMMON PLEAS OF
DELAWARE COUNTY, PENNSYLVANIA

CIVIL ACTION – LAW

IN RE: CONDEMNATION OF LAND FOR
SOUTH EAST CENTRAL BUSINESS:
DISTRICT REDEVELOPMENT AREA #1
[405 MADISON ST., CITY OF CHESTER]
NO. 05-08009

ORDER

AND NOW, this 13th day of December, 2006, upon consideration of the Declaration of Taking filed by the Redevelopment Authority of the City of Chester and Preliminary Objections of Condemnee to said Declaration of Taking, a hearing been held thereon, it is hereby ORDERED that said Preliminary Objections are OVERRULED, the Court finding that the subject property, 405 Madison Street, City of Chester, was properly condemned for a public purpose.

It is further ORDERED that a Board of View be appointed, within (30) days if this Order, to assess the amount of damages and other compensation to which Condemnee Earnestine O. Brown is entitled.

BY THE COURT:

KENNETH A. CLOUSE, P.J.

IN THE COURT OF COMMON PLEAS OF
DELAWARE COUNTY, PENNSYLVANIA

CIVIL ACTION – LAW

NO. 05-08009

IN RE: CONDEMNATION OF LAND FOR
SOUTH EAST CENTRAL BUSINESS
DISTRICT REDEVELOPMENT AREA #1:
[405 MADISON ST., CITY OF CHESTER]

:

OPINION

A Declaration of Taking and Notice of Condemnation directed to Earnestine O. Brown, Condemnee, was filed by the Redevelopment Authority of the City of Chester for the property located at 405 Madison Street, City of Chester, on or about July 14, 2005. On or about August 15, 2005, Condemnee filed Preliminary Objections to said Declaration of Taking; Answer to same and Memorandum of Law in support of said Answer, was filed on September 6, 2005.

A hearing was held before the Honorable Kenneth A Clouse, and the Court, by Order dated December 13, 2006, overruled the Preliminary Objections of Condemnee to the Declaration of Taking, finding that the subject property, 405 Madison street, City of Chester, was properly condemned for public purpose.

Condemnee/Appellant has now filed a Notice of Appeal to the Superior Court of Pennsylvania.....

Condemnee/Appellant contends that he Court erred in barring the introduction of testimony concerning the alleged improper inclusion of the subject property in the Southeast Central Business District Zone as blighted area.

Determination of blight is not subject to judicial review unless the condemnee carries its heavy burden of proving that the blight determination was made with or bad faith. *Mercurio v. Allegheny County Redevelopment Authority.*

839 A.2d 539 (Pa Cmwlth. 2003). It is presumed that the officials have performed their duties in good faith, and the challengers carry a heavy burden to prove the contrary. *Swartz v. Pittsburgh Public Parking Authority*, 63 Pa. Cmwlth. 434, 439 A.2d 1254 (1981).

The burden of establishing fraud, collision, arbitrariness, bad faith or an abuse of power or discretion rests with the condemnee. *In re School District of Pittsburgh*, 430 Pa. 566, 244 A.2d 42 (1968). It is well-established that allegations of

fraud must be plead with particularity Pa.R.C.P. 1019(b). Youndt v. First national bank of Port Allegheny, 868 A.2d 42 (Pa. Super. 2005). A condemnee alleging fraud, bad faith or an abuse of discretion must carry a heavy burden to overcome the presumption that the condemnor acted properly. In re Condemnation of Real Estate by Borough of Ashland, 851 A.2d 992 (Pa. Cmwlth. Ct. 2004).

Appellant/Condemnee Brown herein made no allegation, with particularity or even generally, that the Redevelopment Authority or anyone else connected with the taking acted fraudulently or in bad faith nor did she challenge, in her Preliminary Objections, the propriety of blight determination. The purpose of the condemnation herein, as stated in the Declaration of Taking, is for purposes of acquisition and redevelopment for educational institutional building (including public, private, and charter school and accessory uses thereto. Condemnor and Mr.Vahan Gureghian entered into a contingent Redevelopment Agreement for the redevelopment of the subject property identified in the Redevelopment Plan Proposal for educational charter school purpose, which was contingent upon Chester City Council approval. Prior to the filing of the Declaration of Taking, the City of Chester Planning Commission first

certified the South East Central Business Redevelopment area #1 (including the subject property) as blighted on April 14, 2004. Following the blight certification, A Redevelopment Plan Proposal dated June, 2004, as amended, was approved by the Condemnor's Board on August 11, 2004. After a Public Hearing, the Redevelopment Plan Proposal and the contingent Redevelopment Agreement were approved by Chester City Council on February 9, 2005.

As stated, the blight determination of the Southeast Central Business Zone which included the subject property located at 405 Madison Street, City of Chester, was made by the City of Chester Planning Commission in 2004. Although the only issue that was properly before the Court herein was whether the subject property was condemned for a public purpose, the Court permitted testimony by William Payne, City Planner, concerning his knowledge of the determination of blight [December 12, 2006, Tr. Pp. 140-154]. In addition, Condemnor presented the credible testimony of David Sciocchetti, Executive Director of the Redevelopment Authority, [December 12, 2006, Tr. Pp. 154-179] who described the process of blighting and its approval by the Planning Commission; Condemnee had ample opportunity to cross examine Mr. Sciocchetti. Even if Condemnee had

alleged fraud or bad faith by condemnor Redevelopment authority, the record herein is clearly devoid of any evidence in support thereof.

Similarly, even if Condemnee Brown had alleged fraud or bad faith or the propriety of the blight determination by the City of Chester Planning Commission, said entity responsible for the blight certification of the South East Central Business Redevelopment Area #1, is not a party to the proceeding herein. Thus, any allegations concerning the alleged improper inclusion of the subject property in the blighted area are not property before the Court.

Condemnee/Appellant next contends that the Court erred in barring introduction of testimony permitted by the case of Kelo v. City of New London, 545 U.S. ___, 2005 WL 146929 (No. 04-108) to establish legitimate taking by a private developer.

The recent 205 U.S. Supreme court Decision in Kelo v. New London does not represent a departure from, or a significant expansion of, eminent domain law in Pennsylvania. "To the contrary, the Kelo Decision is consistent with the use of eminent domain to acquire property for redevelopment that is subsequently conveyed to another private

party, a concept well established in Pennsylvania law.

In Kelo, the U.S. Supreme Court was faced with an appeal from a decision in favor of the City of New London by the Connecticut Supreme Court. That Court had found that the use of eminent domain for economic development (the central) focus of the case) did not violate the public use clauses of the Connecticut and federal constitutions. Relying upon its prior decision in Berman, supra, and Hawaii Housing Authority v. Midriff 467 U.S. 229 (1984) (upholding Hawaii statute whereby fee title was taken from lessors and transferred to lessees, subject to payment of just compensation), the Supreme Court in Kelo explicitly stated for the first time that "economic development" is a valid public purpose under the fifth Amendment to the U.S. Constitution. As the Kelo Court stated:

Promoting economic development is a traditional and long accepted Function of government. There is, moreover, no principled way of Distinguishing economic development from the other public purposes That we have recognized...

Kelo Opinion at 14.

After enumerating various precedents in which the Court upheld takings that (a) facilitated

agriculture and mining; (b) remediated blight; (c) broke up a land oligopoly; and (d) reduced barriers to entry in the pesticide market, the Kelo Court stated:

Clearly, there is no basis for exempting economic development from our Traditionally broad understanding of public purposes.

Kelo Opinion at 15.

Unlike the area in Kelo, which was designated as economically distressed but was not "blighted", the area of the subject property in this case was declared blighted by the City of Chester Planning Commission on April 14, 2004. If one were to consider precedent from the U.S. Supreme Court, the more appropriate case is Berman v. Parker, 348 U.S. 26 (1954). In Berman, supra, the U.S. supreme Court upheld a proposed redevelopment plan targeting a blighted area of Washington, DC in which most of the housing for the area's inhabitants was beyond repair. Under the plan, the area would be condemned and part of it used for the construction of streets, schools, and other public facilities. The rest would be leased or sold to private parties for the purposes of redevelopment, including the construction of affordable housing. The owner of a store in the area challenged the condemnation, arguing that his store was not itself blighted. The U.S.

Supreme Court unanimously issued a ruling upholding the condemnation, deferring to the legislative and agency judgment that the area "must be planned as a whole" for the redevelopment plan to be successful.

The Berman case has been cited with approval by Pennsylvania's appellate courts. See e.g. Harford Twp. V. Bandurick, 660 A.2d 189, 191 (Pa Cmwlth, 1995), appeal denied, 666 A.2d 1058 (Pa. 1995); In re Marivitz, 161 Pa.

Cmwlth, 247, 636 A.2d 1241, 1244 (Pa Cmwlth. 1994); S.O.L. Club, Inc. v. City of Williamsport, 65 Pa. Cmwlth. 351, 443 A.2d 410, 411 (Pa Cmwlth. 1982).

The Redevelopment Authority has condemned the subject property, 405 Madison Street, City of Chester, pursuant to the Pennsylvania Eminent Domain Code and the Urban Redevelopment Law. The Urban Redevelopment Law has been upheld as constitutional by the Pennsylvania Supreme Court. See Belovsky v. Redevelopment Authority of the City of Philadelphia, 357 Pa. 329, 54 A.2d 277 (1947). Pennsylvania's appellate courts have upheld numerous condemnations under the Urban Redevelopment Law in which the exercise of eminent domain was challenged on the grounds that the condemnation involved private benefit.

See, e.g. Condemnation of 036 Acres, ore or Less of Land Owned by Wexford Plaza Associates, 674 A.2d 1204 (Pa. Cmwlth. 1996) (taking of land to open and construct new public road to connect existing road to shopping center); (taking of land to open and construct new public road to connect existing road to shopping center); Fleet v. Redevelopment Authority of Washington County, 147 Pa. Cmwlth. 169 A.2d 314 (Pa. Cmwlth. 1992) (companion case) (subsequent transfer of condemned property to private party for redevelopment upheld absent a showing of palpable bad faith" intended to solely benefit a private party); City of Harrisburg, 373 A.2d 774, 30 Pa.Cmwlth. 273 (Pa.Cmwlth. 197) (property could be condemned as party of a redevelopment plan and then used for private residential development as part of that plan).

Since Kelo was not a departure from the law in Pennsylvania, no testimony specific to that decision was relevant to the proceedings, herein; the Court, thus, properly barred testimony solely in connection with that case that was not relevant to the issue of whether the subject property was properly condemned for a public purpose.

Pennsylvania's Constitution establishes three (3) fundamental principles governing the

exercise of eminent domain powers. First, condemnation of property is proper only if it is for a public use. In re: Certain Parcels of Land in First Ward of City of Lancaster, 420 Pa. 295, 216 A.2d 7669 (1966); Adelphia Cable Vision Associates of Radnor, L.P. v. University City Housing Co., 755 A.2d (Pa.Super. 2000). In this case, Condemnor condemned the subject property for redevelopment and educational use as a charter school. The second constitutional requirement is that the power of eminent domain must be exercised in accordance with "authority of law". Condemnor is authorized under the Urban Redevelopment Law to exercise the power of eminent domain. Finally, just compensation must be made or secured by the Condemnor. As Exhibit D to the Declaration Taking, Condemnor filed an Open-Ended Bond Without Surety as security for the condemnation.

The Court properly concluded that the condemnation and redevelopment of the subject property for education use as a charter school is a valid "public use.

A "charter school" is defined by the Pennsylvania Charter School Law, Article XVII-A of the Public School Code of 1949, 24 P.S. §17-1701A et seq., as follows:

'Charter school' shall mean an independent public school established and operated under a charter from the local board of school directors and in which student are enrolled or attend. A charter school must be organized as a public, nonprofit corporation. Charters may not be granted to any for-profit entity.

24 P.S. section 17-1703-A

The legislative intent behind the Charter School Law is found at 24 P.S. §17-1702-A

It is the intent of the General Assembly, in enacting this article, to provide opportunities for teachers, parents, pupils and community members to establish and maintain schools that operate independently from the existing school district structure as a method to accomplish all of the following:

Provide parents and pupils with expanded choices in the types of educational opportunities that are available within the public school system.

The Court concluded, and the Pennsylvania Legislature had decreed, that Charter Schools are

a legitimate form of independent public school as above stated; that the legislature has required that Charter Schools shall be accountable to the parents, the public and the Commonwealth with the delineation of that accountability reflected in the charter, 24 P.S. §1701715-A; and that Charter Schools are public in nature in that they are (a) prohibited from unlawfully discriminating in admissions, hiring or operation; (b) required to be non-sectarian in all operations; and (c) prohibited from providing religious instruction. See 24 P.S. §17-1715-A, subsections (3)-(5).

Finally, Appellant/Condemnee Brown contends that the condemnation of the subject property and Mr. Gureghians role as a private developer involved in the subsequent sale and redevelopment of the subject property for an educational charter school is not in the public interest.

The Condemnee and Condemnor have entered into a Redevelopment and Sale Agreement regarding the subject property by which the redeveloper is responsible for paying all of the costs of the condemnation proceedings. The Redevelopment and Sale Agreement was approved by the Redevelopment Authority Board and the Chester City Council. Condemnees arguments are strikingly similar to arguments

rejected by the Commonwealth Court in Appeal of Heim, 617 A.2d 74, 151 Pa.Cmwlth. 438 (Pa. Cmwlth. 1992), appeal denied, 629 A.2d 1385, 535 Pa. 625 (1993) (condemnation of land for use a residential development access road for new residential development).

Condemnees argue that the declaration of taking was invalid because it was for a private purpose. This argument is based on the allegation that developers are the beneficiaries of this condemnation, as evidence by the fact that, pursuant to the development agreement, developers agreed to pay all costs of the condemnation proceedings. Condemnees go on to argue that the township had no authority to enter into the development agreement.

A taking does not lose its public character merely because there may exist in operation some feature of private gain; if public good is enhanced, it is immaterial that private interest also may be benefited.

Condemnees would have us declare that an agreement between a municipality and a developer by which the developer agrees to assume all of the expenses incident to the condemnation of property necessary to the development, including the expense of

hiring an attorney to pursue the condemnation, is per se improper. We can see no reason to make such a holding. Indeed, such an agreement is quite logical in that it benefits the taxpayers of the municipality by shifting the costs onto the developer.

Appeal of Heim, 617 A. 2d 74, 151 Pa.Cmwlth. 438 (Pa.Cmwlth. 1992), appeal denied, 629 A.2d 1385, 535 Pa. 625 (1993)

Condemnee Brown has raised objections by way of Preliminary Objections concerning building code compliance of the construction upon the subject property.

The Court concludes that Preliminary Objections based on these claims should be dismissed. The eminent Domain Code states in relevant part.

Preliminary objections shall be limited to and shall be the exclusive method of challenging (1) the power or right of the condemnor to appropriate the condemned property unless the same has been previously adjudicated; (2) the sufficiency of the security; (3) any other procedure followed by the condemnor; or (4) the declaration of taking. Failure to raise

these matters by preliminary objections shall constitute a waiver thereof.

26 P.S. §1-406

See also Condemnation of .036 Acres, More or Less, of Land Owned by Wexford Plaza Associates, 674 A.2d 1204 (Pa. Cwlth. 1996) (Commonwealth Court concluded that condemnees' claim that proposed road for residential development violated both Township standards and provisions of the Second Class Township Code was not proper grounds for Preliminary Objections, as the condemnation of the land, by itself, could not arguably violate those provision).

Furthermore, Condemnee's suggestion, in her Preliminary Objections, that the proposed charter school building would be constructed with inferior materials and workmanship is without merit. Charter schools are not exempt from laws pertaining to the health or safety of student [see 24P.S. §17-1722-a], and the redeveloper must comply with applicable statutory and regulatory requirements. Additionally, before construction commences, the redeveloper must first submit an application and plans to the City of Chester and secure building permits for the proposed charter school. See City of Chester Ordinance Nos. 1325.02 and 1325.03, Once a newly constructed

building or a renovated building is ready for occupancy, a Certificate of occupancy must be obtained prior to its use. See City of Chester Ordinance No. 1325.04. To obtain the Certificate, the owner or contractor must submit a letter to the City of Chester Building Official stating that all work is complete and the building is ready for the final inspection. The Building official then schedules a final inspection and issues a Certificate of Occupancy once all work is satisfactorily complete.

The Court concludes that the Redevelopment Authority properly exercised its legal authority for the condemnation and redevelopment of the subject property for educational use as a "charter school". The Urban Redevelopment Law grants

redevelopment authorities the power of eminent domain: for the public purposes of the elimination of blighted areas through economically and socially sound redevelopment of such area". Section 2 of the Urban Redevelopment Law, 35 P.S. §1702. A certification of blight justifies condemnation by a redevelopment authority, but each property condemned as part of a redevelopment plan need not be blighted. It is sufficient that the area in which the property is located is blighted and designated for

redevelopment. In re City of Harrisburg, 30 Pa.Cmwlth. 273, 373 A.2d 774 (1977).

Although Condemnee Brown, as above stated, sought to elicit testimony concerning the propriety of the blight determination, Condemnee's Preliminary Objections have not challenged the blight determination of the Redevelopment Area by the City of Chester Planning Commission on April 14,, 2004, thus Condemnee has waived any objections thereto, 26 P.S. §1-406. As the Commonwealth Court stated in denying amended Preliminary Objections to a Declaration of Taking filed in Condemnation of .036 Acres, More or Less of land owned by Wexford Plaza Associates,, 674 A.2d 1204 (Pa.Cmwlth. 1996):

Preliminary Objections in the context of eminent domain actions served a different purpose than preliminary objections filed in other civil actions. In eminent domain cases, preliminary objections are intended as a procedure to resolve expeditiously the factual and legal challenges to the declaration of taking before the parties proceed to determine damages. Thus, with regard to preliminary objections, section 406 of the Eminent Domain Code, Act of June 22, 1964, Special Sess., P.L. 84 as

amended, 26 P.S. §10406 (emphasis added), provides in pertinent part:

With thirty days after being served with notice of condemnation, the condemnee may file preliminary objections to the declaration of taking. the court upon cause shown may extend the time for filing preliminary objections. Preliminary objections shall be limited to and shall be the exclusive method of challenging (1) the power or right of the condemnor to appropriate the condemned property unless the same has been previously adjudicated; (2) the sufficiency of the security; (3) any other procedure

followed by the condemnor; or (4) the declaration of taking. Failure to raise these matters by preliminary objections shall constitute a waiver thereof.

- (a) All preliminary objections shall be raised at one time and in one pleading. They may be inconsistent.
- (e) The court shall determine promptly all preliminary objections and make such preliminary and final orders and decrees as

justice shall require, including the revesting of title.

In light of these provisions, the trial court properly overruled Condemnees amended preliminary objections.

Condemnation of .036 Acres, More or Less of Land Owned by Wexford, *supra*, 674 A.2d at 1207.

The Court concludes that the Urban Redevelopment Law clearly authorizes redevelopment authorities to exercise the power of eminent domain:

An Authority shall constitute a public body, corporate and public, exercising public powers of the Commonwealth as an agency thereof, which powers shall include all powers necessary or appropriate to carry out and effectuate the purposes and provisions of this act, including the following powers in addition to those herein otherwise granted:

(i) To acquire by eminent domain real property, including improvements and fixtures for the public purposes set forth in this act, in the manner hereinafter provided, except

(ii) real property located outside a redevelopment area.

35 P.S. §1709(I)

In this case, the Condemnor Redevelopment Authority clearly properly exercised its statutory powers I undertaking the instant condemnation for redevelopment purposes.

Finally, the Court concludes that Condemnee's "affirmative defenses" and/or claims relating to just compensation and/or liability for unpaid real property taxes are not the proper subject of Preliminary Objections. Notwithstanding same, the Court concludes that the Condemnor herein has properly secured the payment of just compensation. This Eminent Domain Code requires all condemnors to give security for the condemnation.

§1-403. Security required

(a) Bond. Except as hereinafter provided, every condemnor shall give security to effect the condemnation by filing with the declaration of taking its bond, without surety, to the Commonwealth of Pennsylvania for the use of the owner or owners of the property interests

(b) condemned, the conditions of which shall be that the condemnor shall pay such damages as shall be determined by law.

26 P.S. §1-403(a).

The Condemnor Redevelopment Authority tendered the Bond without surety required by 26 P.S. §1-403(a) as Exhibit D to the Declaration of Taking. Furthermore, the Condemnor and the Redeveloper have executed a Redevelopment Agreement approved by Chester City Council that requires Redeveloper to pay all of the costs required by the condemnation. The Bond tendered by the Redevelopment Authority specifically provides that the Condemnor shall pay such damages as the same shall be agreed upon or be determined by law. The court concluded that the Bond presented adequately secures the payment of Just Compensation pending a Board of View Hearing on damages.

The "affirmative defenses" set forth in Condemnee's Preliminary Objections suggest impropriety and/or a lack of good faith as to the calculation of just compensation. These vague allegations lack specificity in violation of 26 P.S.

§1-406(b) ("Preliminary objections shall state specifically the grounds relied upon") and fail to satisfy Condemnee's heavy burden to show fraud, bad faith, or abuse of discretion, (see Schwartz v.

Pittsburgh Public Parking Authority, supral and should be dismissed accordingly. Additionally, the Condemnees Preliminary Objections are not the proper means for challenging the calculation of just compensation or the determination of distribution of condemnation proceeds.

The Court further concludes that it is improper to challenge the estimated just compensation by way of Preliminary Objection prior to a demand by the condemnor for possession. Township of Chester v. Dept. of Transportation, 20 Pa.Cmwlth.60 339 A.2d 892 (1975). Furthermore, the Court concludes that the issue of just compensation is improperly raised in Preliminary Objections to a declaration of taking. Condemnation by the Commonwealth of Pennsylvania Dept. of Transportation of Right of Way for Legislative Route 146, 119 Pa.Cmwlth 620, 547 A.2d 867 (1988),, and same will be addressed at the time of the hearing before the Board of View, which is concerned with the calculation of damages, as well as the issues of the determination of damages, the effect of any liens of unpaid real

estate taxes, and distribution of condemnation proceeds.

Accordingly, the Court properly concluded that the condemnation at issue is for a valid public use and was properly effectuated by the Condemnor under the Pennsylvania Eminent domain Code and the Urban Redevelopment Law.

In addition, the recent 2005 U.S. Supreme Court decision in Kelo v. New London does not represent a departure from, or significant expansion of, eminent domain law in Pennsylvania. To the contrary, the Kelo decision is consistent with the use of the eminent domain to acquire property for redevelopment that is subsequently conveyed to another private party, a concept well established in Pennsylvania law. It should be noted that the more relevant U.S. Supreme Court precedent is the decision in Berman v. Parker which (unlike Kelo) involved property located in a blighted area.

Finally, the condemnee has improperly raised issues relating to just compensation and/or calculation of eminent domain damages and distribution thereto by way of Preliminary Objections; those

Objections are all properly to be placed before a Board of View, rather than the Court of Common Pleas.

For the aforementioned reasons, the Court properly **OVERRULED** the Preliminary Objections of Condemnee, Earnestine Brown, to the Declaration of Taking, by Order dated December 13, 2006.

BY THE COURT:

KENNETH A. CLOUSE, J